BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 97-CF-001898, 99-CO-000785,
99-CO-001528, and 01-CO-001407

MAURICE A. SYKES, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Crim. No. F-9723-95

I N D E X

TABLE OF CASES

* Cases chiefly relied upon are marked by an asterisk.

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OTHER REFERENCES

ISSUES PRESENTED

In the opinion of the appellee, the following issues are presented:

I. Whether a Brady violation was committed where the defense effectively used impeachment information disclosed by the government before trial, and where, as a sanction to the government for the late disclosure of this information, the defense was allowed to distort the impeachment testimony by introducing only those portions of the information that were favorable to the defense.

II. Whether appellant's confrontation rights were violated under Bruton v. United States, 391 U.S. 123 (1968), where his co-defendant's statement that appellant was a "pipehead" was inadvertently elicited at trial; the statement was struck completely from evidence; and the jury was instructed to disregard the statement.

III. Whether the trial court abused its discretion in permitting the government to introduce as evidence of consciousness of guilt newspaper articles referring to appellant and the charges against him, which appellant had surreptitiously torn up and discarded while in custody, where there was no bad faith associated with the government's delay in disclosing this evidence until trial; the court instructed the jury concerning the government's

late disclosure; appellant was permitted to fully attack the credibility of the government's witness who testified to this evidence; and appellant rejected other offers to cure any prejudice resulting from the late disclosure.

IV. Whether appellant was denied his Fifth Amendment right to testify, where appellant admitted in a post-trial hearing that he knew of his right to testify at trial, and where the trial court made post-conviction findings of fact that appellant knowingly and voluntarily waived his right to testify.

V. Whether appellant's pretrial, lineup identification should have been excluded as unduly suggestive and unreliable (i) because of an alleged disparity in the appearance of the lineup participants, where there was nothing about the lineup which would direct a witness's attention to a particular individual; and (ii) because appellant was allegedly wearing leg irons, where there are no facts in the record to support appellant's assertion that the government's witness could see the leg irons at the lineup, and appellant conceded at trial that the photo of the lineup did not show the leg irons.

VI. Whether the evidence was sufficient to convict appellant for felony murder, attempted armed robbery, and possession of a firearm during a crime of violence on a theory of aiding and abetting, where the government introduced evidence at trial from

which the jury could infer that appellant was with the armed principal before committing the charged felonies, appellant jointly participated in the commission of the armed felonies, and appellant fled the scene of the crime with the principal.

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COUNTERSTATEMENT

On May 8, 1996, appellant Maurice A. Sykes and his co-defendants, Gary Washington and Shon A. Hancock, were each indicted on one count of conspiracy to commit armed robbery (D.C. Code §§ 22-2901, -3202), two counts of attempt to commit robbery while armed (D.C. Code §§ 22-2901, -3202), two counts of first-degree felony murder while armed (D.C. Code §§ 22-2401, -3202), one count of first-degree premeditated murder while armed (D.C. Code §§ 22-2401, -3202), one count of possession of a firearm during a crime of violence (PFCV) (D.C. Code § 22-3204(b)), and one count of

carrying a pistol without a license (CPWL) (D.C. Code § 22-3204(a)) (R1. 24).[1/] The three were charged in connection with the attempted armed robbery of two Bulgarian men on October 23, 1995, outside the Bulgarian Embassy in Northwest Washington, D.C. One of the Bulgarian men was shot and killed during the attempted robbery.

The government dismissed the conspiracy charge before trial (3/24/97 Tr. 56). A jury trial commenced before the Honorable Reggie B. Walton on April 9, 1997 (R1. 1 at 21). The charges of first-degree premeditated murder while armed against appellant and Hancock were subsequently dismissed (4/29/97 Tr. 817). Appellant was found guilty of the remaining counts on May 6, 1997 (R1. 1 at 27).[2/] On October 10, 1997, appellant was sentenced to a term of imprisonment of fifteen years to life for each count of attempted armed robbery, thirty years to life for felony murder, five to fifteen years for PFCV, and twenty months to five years for CPWL (R1. 101). The court imposed mandatory minimum prison terms of

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[1/] Citations to the D.C. Code refer to the 1981 edition and its supplements. "R1." refers to the record on appeal in 97-CF-1898, "R2." refers to the record on appeal in 99-CO-785, "R3." refers to the record on appeal in 99-CO-1528, and "R4." refers to the record on appeal in 01-CO-1407. Transcript references are noted by date and the abbreviation "Tr."

[2/] Co-defendant Washington was found guilty of all counts; the jury hung on the charges against Hancock and a mistrial was declared in his case. Co-defendant Washington died after he was sentenced and while his appeal was pending, and his appeal has since been dismissed as moot.

thirty years for felony murder while armed, five years for attempted armed robbery, and five years for PFCV (R1. 101; 10/10/97 Tr. 22-23).[3/] Appellant filed a timely notice of appeal on November 7, 1997 (Appeal No. 97-CF-1898) (R1. 1 at 33, 133).

On June 11, 1997, appellant filed a pro se motion captioned, "Motion to Compel Ineffective Assistance of Counsel," which the court construed as a motion filed pursuant to D.C. Code § 23-110 (R2. 15). On January 2, 1998, appellant filed a pro se motion to vacate his sentence, which the court treated as a supplement to appellant's § 23-110 motion (R2. 2, 16). By order dated March 26, 1999, the court denied appellant's § 23-110 motion without a hearing (R2. 2 at 3). Appellant timely noted his appeal of this denial on April 22, 1999 (Appeal No. 99-CO-785) (R2. 32).

On July 6, 1999, appellant filed another pro se § 23-110 motion alleging ineffective assistance of counsel during his sentencing hearing (R3. 8). The court denied appellant's second § 23-110 motion on August 30, 1999, and appellant timely noted his appeal of this denial on September 13, 1999 (Appeal No. 99-CO-1528) (id. at 15, 16).

[3/] The attempted armed robbery sentences run concurrently with each other and the felony armed murder sentence (R1. 101). The PFCV sentence runs concurrently with the felony armed murder sentence, but consecutively to the attempted armed robbery sentences (id.). The CPWL sentence runs concurrently with all other sentences (id.).

Appellant subsequently filed, on November 6, 2000, a motion to vacate the court's order denying his first § 23-110 Motion (R4. 1 at 47; R4. 17). After holding an evidentiary hearing, the court denied appellant's motion on October 24, 2001 (R4. 60). Appellant timely noted his appeal to the court's denial of his motion on November 5, 2001 (Appeal No. 01-CO-1407) (R4. 61).

THE TRIAL

The Government's Evidence

On October 23, 1995, in Sophia, Bulgaria, Vihar Mihailov received a phone call from the United States (4/11/97 Tr. 140). A former colleague at the Bulgarian Embassy in Washington, D.C. called to inform the Mihailovs that their twenty-one-year-old son, Evgeny, had been shot and killed on the steps of the embassy. Evgeny, who had stayed behind in D.C. to earn money for school when the rest of his family returned to Bulgaria in August, was shot for his leather jacket (4/11/97 Tr. 137-38).

On the night of the shooting, around 9:00 p.m., Evgeny Mihailov was sitting on the lighted steps outside the Bulgarian Embassy, located at 22nd and R Streets, N.W., talking with two other young Bulgarian men, seventeen-year-old Velio Kitanov and nineteen-year-old Peter Enchev (4/14/97 Tr. 151-52; 4/15/97 Tr. 63; 4/16/97 Tr. 11, 128). As the three sat there, a big, "gold or orange" colored car drove by (4/14/97 Tr. 152; 4/16/97 Tr. 12). Nineteen-

year-old Jordan Petkov, sitting near the embassy, also noticed the "gold metallic," four-door car (4/16/97 Tr. 126, 128, 129-31).

About half an hour after the car drove by, another Bulgarian, Paniot Ignatiev, was returning from dinner (4/14/97 Tr. 285-87).[4/] Mr. Ignatiev had arrived in D.C. earlier that day to do repair work on the embassy (id. at 285). As Mr. Ignatiev approached the embassy, someone grabbed him (4/15/97 Tr. 5). Turning around, Mr. Ignatiev saw two dark-skinned men (id.). He freed himself briefly before a sharp blow struck his head, causing him to black out momentarily (id. at 5-6). When he regained consciousness a short time later on the embassy steps, his attacker was still beating him (id. at 6-7). Mr. Ignatiev cried out to the young men on the embassy steps, telling them to ring the buzzer on the embassy door for help (id. at 10).

Velio Kitanov, sitting with Mr. Mihailov on the embassy steps, could see the two men punching Mr. Ignatiev (4/14/97 Tr. 155-56). The taller of the two men, who was wearing a dark, knee-length leather jacket, held a gun (id. at 157-59, 215-16). Mr. Ignatiev tried to crawl away, but the shorter assailant kept punching him (4/14/97 Tr. 159).

The gunman turned to the three young men on the steps and, brandishing his gun, demanded money (id. at 159-60; 4/16/97 Tr. 15-

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[4/] Mr. Ignatiev, as well as some of the other Bulgarian witnesses, testified in Bulgarian through translators.

16). Mr. Mihailov offered the gunman a couple of dollars (4/16/97 Tr. 16). Grabbing Mr. Mihailov by the arm, the gunman told him to give him his leather jacket (4/14/97 Tr. 160; 4/16/97 Tr. 16). Mr. Kitanov urged his friend to give the gunman his jacket, but Mr. Mihailov said that the gun was not loaded (4/14/97 Tr. 162). As Mr. Mihailov tried to pull away from the gunman, a shot was fired (id.). Mr. Mihailov screamed and started running up the stairs to the embassy door along with Mr. Kitanov and Mr. Enchev (id.). The young men had almost made it inside the embassy when the gunman fired another shot, this one hitting Mr. Mihailov (id.). After firing the second shot, the gunman turned around, briefly looked at Mr. Kitanov, and then ran away, without Mr. Mihailov's jacket (id.). Mr. Ignatiev's attacker also ran away, and Mr. Ignatiev ran inside the embassy, noticing later that the clasp to his watch was bent (4/15/97 Tr. 10-11).

Mr. Petkov started walking towards the embassy when he heard the gunshots (4/16/97 Tr. 132). As he did, he saw two men, one with a long, black jacket, running toward the same gold car he had seen earlier (id. at 132-33). The two men got into the car, and the car sped off (id. at 133). Mary Sherman Willis, a freelance writer who lived half a block from the Bulgarian Embassy, also heard both gunshots (4/16/97 Tr. 152-53). She looked out her window, which overlooked 22nd Street, and saw an old, gold-colored

Chevrolet pull up (id. at 154-55). Two men ran up to the car, climbed in the back seat, and took off (id. at 154).

Mr. Mihailov was transported to the George Washington University Hospital where he was pronounced dead at 9:40 p.m. (4/17/97 Tr. 339). A .38 caliber bullet was recovered from his body during the autopsy (id. at 339, 348).

Mr. Ignatiev got a "very good look" at the man who beat him, but not at the gunman (4/15/97 7-8). He described his attacker as twenty to thirty years old, shorter than his cohort, with "large characteristic eyes" and normal build (id. at 8). About an hour after the shooting, Mr. Kitanov, Mr. Enchev, and Mr. Ignatiev were taken to view a showup of three men (none of whom was one of the defendants) who had been stopped by the police about a block away from the embassy (4/14/97 Tr. 193; 4/15/97 Tr. 16; 4/16/97 Tr. 26). Neither Mr. Kitanov nor Mr. Ignatiev made any identifications, saying that they did not recognize the men shown to them (4/14/97 Tr. 193; 4/15/97 Tr. 16).[5/]

Around the same time in Capitol Heights, Maryland, Ralph Williams was gambling at a boarding house owned by a man called Greasy (4/25/97 Tr. 208). With Mr. Williams were two men named Wayne Sellers and Tony Parrott (id.). Mr. Williams testified that

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[5/] Mr. Enchev, who said he did not get a good look at either assailant, did not recall what he told the police after viewing these men (4/16/97 Tr. 26).

appellant, Washington, and Hancock walked into Greasy's around 11:00 p.m. (id. at 211).[6/] Washington, who was wearing a three-quarters length black, leather jacket, was talking about "bust[ing]" "this motherfucker up on Sixteenth Street, over a jacket" (id. at 212-13). Washington said he was trying "to get" this guy who was running toward a door, but then a buzzer went off (id. at 213). Washington said he panicked and shot the guy (id.).[7/] Appellant chimed in saying "that he was beating this guy up for a watch, an older guy" (id.). Appellant shadow-boxed to demonstrate the beating (id.). Hancock said that he was in the car (id. at 214). All three laughed as they told their stories (id.). That same night at Greasy's, Washington tried to sell his leather jacket (id. at 216). Mr. Williams, Mr. Sellers, and Mr. Parrott each tried on the jacket (id.). When Mr. Williams tried it on, he found a rusted .38 revolver in the inside pocket (id. at 217). Mr. Williams handed the gun to Washington, and Washington removed two bullets from it (id. at 218). When Mr. Williams left Greasy's

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[6/] Mr. Williams' identity was kept secret until shortly before the start of trial. As an informant for the government, he received money and other benefits about which he was cross-examined.

[7/] Washington's statements at Greasy's were admitted against appellant as adoptive admissions (4/7/97 Tr. 25-26). Appellant does not challenge the admission of this evidence on appeal.

place that night he saw Hancock's car parked on a side street (id. at 220).

Mr. Williams initially did not believe the story that he had heard at Greasy's (id. at 221). But the next day, when he heard about a shooting at an embassy on the news, he contacted Detective Mike Lucia, a DEA agent, for whom Mr. Williams had previously worked as an informant (id. at 221-22). Mr. Williams asked Agent Lucia if there was a reward for information (id. at 223). Agent Lucia put Mr. Williams in touch with Sergeant Joseph McCann of the Metropolitan Police Department (MPD) and Mr. Williams told him what he had heard at Greasy's (id. at 225). Four days after the shooting, on October 27, Mr. Kitanov and Mr. Enchev were shown an array of photos, but recognized none of the pictures (4/14/97 Tr. 194; 4/16/97 Tr. 82).[8/] The following day, Detective Lucia received a phone call from Mr. Williams, who said that he was in the 900 block of Balboa Avenue in Capitol Heights and that he saw Hancock's gold-colored Chevrolet Caprice there (id. at 227). After receiving this information, Sergeant McCann and Detective Todd Williams, also of MPD, drove two witnesses, Mr. Kitanov - who had been on the steps and seen the gunman - and Ms. Willis - the freelance writer who had seen the getaway car - to Balboa Avenue to see if either

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[8/] Of the three defendants, only Washington's photograph was among the photographs included in the array (4/21/97 Tr. 557-58).

recognized Hancock's car as the car used in connection with the embassy shooting (4/14/97 Tr. 194; 4/16/97 Tr. 168).

Mr. Kitanov, who was in a separate, unmarked car with Sergeant McCann, did not recognize any car as the two men drove down Balboa Avenue (4/14/97 Tr. 195). On a second drive by, however, Mr. Kitanov spotted the gunman sitting inside a car, and told Sergeant McCann to "drive fast, drive fast" (id. at 196). Mr. Kitanov was certain that the man he had seen sitting in the car was the gunman (id. at 197).[9/] As Ms. Willis drove down Balboa Avenue with Detective Williams, also in an unmarked car, she saw a car that looked like the gold-colored Chevrolet she had seen on the night of the embassy shooting (4/16/97 Tr. 170).

Shortly thereafter, appellant was arrested on November 2, 1995, in Capitol Heights (4/21/97 Tr. 570). Two days later, Detective Williams spotted Hancock driving his gold-colored Caprice in Capitol Heights with three other men in the car (4/21/97 Tr. 583-84). When the car pulled into a parking area outside of a store in Prince George's County, Washington and Hancock, who were both in the car, were placed under arrest (id. at 587-89).

Hancock was advised of his rights by Detective Williams (id. at 590). After the charges against him were explained, Hancock

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[9/] Both Hancock and Washington later told the police that they saw Detective Williams and Sergeant McCann driving down Balboa Avenue on this day (4/21/97 Tr. 595, 602).

said, "So I am charged with driving the car away?" (Id. at 594.) Two days later, November 6, Detective Williams interviewed Washington after he was transferred to D.C. (id. at 600). Detective Williams attempted to talk to Washington about the incident at the embassy, telling Washington that the police had witnesses to the shooting (id. at 600-03). Washington responded, "If you have all of these witnesses, won't you put me in a lineup or something?" (id. at 603). Detective Williams said he might do that, to which Washington quipped, "Well, I will take my chances that the other white boys from the embassy won't say it is me" (id. at 603). Detective Williams had not given Washington any information about the number, sex, or race of the witnesses in the case (id.). Washington also said, "So, what you want me to say is I was up on the steps and accidentally shot that kid" (id. at 603-04). Detective Williams had provided no details about the specific location of the shooting (id. at 604).

On November 17, 1995, appellant was transported from Maryland to D.C. and was temporarily placed in an interview room (4/21/97 Tr. 574). Detective Williams could observe appellant in the interview room through a monitor (id. at 575). The detective saw appellant stand up, remove some papers from his pocket, tear up the papers, and place them in a trash can (id.). After appellant was taken to the cell block, Detective Williams returned to the

interview room to retrieve the discarded papers (id. at 575-76). Piecing the papers back together, Detective Williams discovered that they were two newspaper articles about the embassy shootings (id. at 576). The articles named appellant as one of the people arrested in connection with the embassy shooting (4/23/97 Tr. 184-85).

On December 14, 1995, two lineups were held. Washington stood in the first lineup and appellant in the second (4/28/97 Tr. 633). Mr. Enchev and Ms. Willis did not identify either appellant or Washington in the lineups (4/16/97 Tr. 26, 89, 106; 4/17/97 Tr. 183, 231). Mr. Enchev did not recognize anyone from the second lineup; Ms. Willis identified a man who was not appellant at the second lineup (4/16/97 Tr. 106; 4/17/97 Tr. 183, 231).

Mr. Kitanov and Mr. Ignatiev also viewed both lineups. At the first lineup, Mr. Kitanov immediately identified Washington as the gunman (4/14/97 Tr. 199). At the second lineup, Mr. Kitanov identified a man wearing shield number seven, not appellant, as the other attacker (id. at 262). Mr. Kitanov indicated that he was not certain of this second identification because he did not get a good look at the shorter man (id. at 263, 281). At the first lineup, Mr. Ignatiev thought he recognized the taller assailant, but did not pick out Washington (4/15/97 Tr. 17-18, 28). At the second lineup, Mr. Ignatiev identified appellant (id. at 18). Mr.

Ignatiev was "absolutely sure" that appellant was his attacker (id. at 21). He stated that he recognized appellant as soon as he entered the viewing room, but took his time before making his identification (id.).

At the close of the government's case, appellant moved for a judgment of acquittal, which was denied (4/28/97 Tr. 627, 629).

The Defense Evidence

Appellant claimed he had an alibi. His two siblings, Michael Sykes and Michelle McCoy, testified that on October 21, their great-grandmother, who had lived in North Carolina, had passed away (4/28/97 Tr. 638, 651). Michael Sykes and Ms. McCoy stated that they traveled down to North Carolina with their brother on October 23, the day of the embassy shooting, to attend the funeral, which was held on October 25 (id. at 638). They left D.C. around 3:00 p.m., and arrived in North Carolina at approximately 7:00 p.m., and stayed there until the funeral (id. at 641, 642, 654, 656).

Appellant recalled Detective Williams who testified that Mr. Ignatiev told him on the day after the shooting that he would try to assist with the investigation, but that he did not have a good memory for faces (id. at 667). Mr. Ignatiev suggested that Detective Williams talk to the other young Bulgarians who were on

the embassy steps because they had seen the attackers face to face (id. at 667).[10/]

The grand jury testimony of Mr. Sellers and Mr. Parrott, the men who were gambling with Mr. Williams at Greasy's and who were unavailable to testify, was introduced jointly by all three defendants (4/29/97 Tr. 824-26). In their grand jury testimony, these two men contradicted the government's informant, Mr. Williams, by testifying that defendants never discussed the embassy incident with them (id.). The government impeached the credibility of Mr. Sellers and Mr. Parrott by introducing evidence of their prior convictions (id. at 835-36).

ARGUMENT

I. There was no Brady violation because appellant effectively used the Brady information belatedly disclosed before the start of trial.

Appellant contends that the government's deliberate delay in disclosing the impeachment evidence of Mr. Williams, the government's informant, in the form of Messrs. Sellers' and Parrott's testimony, was a Brady violation and warrants reversal (Brief for Appellant at 26-32; Supplemental Brief for Appellant at 19-25). Because appellant could and did use this Brady information at trial, and used it effectively, his arguments are without merit.

[10/] When asked about this statement on cross-examination, Mr. Ignatiev explained that he only meant he did not get a good look at the taller assailant, the shooter (4/15/97 Tr. 44).

A. Background

During pre-trial discovery, appellant made a Brady request for all exculpatory information in the possession of the government (R1. 27). In a letter served on defense counsel on April 7, 1997, the eve of trial, the government informed the defendants of the identities of two witnesses, Wayne Sellers and Tony Parrott, who were present when Mr. Williams heard appellant and Washington admit to committing the robbery and shooting at the Bulgarian Embassy (4/7/97 Tr. 8). The government informed the defendants that Mr. Sellers' and Mr. Parrott's May 2, 1996 grand jury testimony impeached Mr. Williams' testimony. At the time of this disclosure, Mr. Parrott could not be located by the government (id.). The government indicated that Mr. Parrott "deals drugs" and was "evading everybody" (id. at 10). Mr. Sellers, however, was available to testify (id. at 8, 16-17). The government indicated that Mr. Sellers was incarcerated in Hagerstown and that it was applying for a writ to secure Mr. Sellers' presence at trial (4/23/97 Tr. 31).[11/]

Counsel for appellant protested the late disclosure of this Brady information (4/7/97 Tr. 8). The government represented that the information was not turned over sooner in the interest of

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[11/] The government explained that it anticipated securing Mr. Sellers' presence to interview him, to explain to him why he was needed at trial, and to serve a subpoena on him (4/23/97 Tr. 31-32).

protecting the identity of its informant, Mr. Williams (id. at 9). The court reprimanded the government for not taking measures to at least ensure that Mr. Parrott was under subpoena and thus available to the defense (id. at 10). The court proposed that if Mr. Parrott could not be located, then his grand jury testimony could be used by the defense (id. at 13). Thereupon, trial counsel for Washington requested Mr. Parrott's grand jury testimony (id. at 14-16). The court reserved ruling on this request to see if the parties could locate Mr. Parrott (id. at 17-19). Appellant's counsel requested a continuance on the condition that appellant be released while the parties searched for Mr. Parrott (id. at 22). The court denied the request to release appellant, but was willing to grant a continuance (id.). After consultation with appellant, counsel asked for forty-eight hours to attempt to locate Mr. Parrott (id. at 31, 60).[12/]

Forty-eight hours later, on April 9, 1997, before the trial started, the parties represented that they had not been able to locate Mr. Parrott (4/9/97 Tr. 4-6). The government agreed to turn over his grand jury testimony (id. at 5). Denying a defense motion to strike Mr. Williams' testimony or to dismiss the case, the court offered to continue the trial to give defendants an opportunity to

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[12/] With respect to Mr. Sellers, who was available to testify, the court found that the government had satisfied its Brady obligations, and thus, it was unnecessary for the government to turn over his grand jury testimony (4/7/97 Tr. 18).

find Mr. Parrott (id.). Defendants declined the court's offer (id. at 7). In the alternative, the court proposed that defendants go forward with the grand jury testimony (id.). Defendants agreed with this proposal (id. at 8, 10).

On Wednesday, April 23, 1997, the tenth trial day, the government informed the court and defendants that Mr. Sellers, who had been moved to the D.C. Jail pursuant to a government writ, had accidentally been released from jail the prior weekend (4/23/97 Tr. 31-32). Having just learned of his release, the government represented that steps were being taken to locate Mr. Sellers, but that he had not yet been found (id. at 33).[13/] The government turned over his grand jury testimony immediately (id. at 36-37). No motion for a continuance or mistrial was made.

In his defense, Hancock sought to introduce limited portions of Mr. Sellers' and Mr. Parrott's grand jury testimony (4/28/97 Tr. 677). The government objected to this limited admission and contended that additional portions of their grand jury testimony

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[13/] Appellant contends that the government never proffered what steps were being taken to locate Mr. Parrott or Mr. Sellers (Supplemental Brief for Appellant at 23). However, neither appellant nor the court requested such a proffer. By attaching the affidavit of Phillip Hatcher to his supplemental brief, appellant appears to suggest that the government did not undertake adequate steps to locate Mr. Sellers. However, because the affidavit was not part of the record below, it should be disregarded by this Court. See Pettaway v. United States, 390 A.2d 981, 984 (D.C. 1978) (improper for Court to consider affidavits attached to appellant's reply brief, where the affidavits were not presented to the trial court and thus were not part of record on appeal).

should come in because Mr. Sellers and Mr. Parrott contradicted each other on significant points (id. at 678). The court agreed, but indicated its intention to restrict impeachment to the events of October 23 at Greasy's (id. at 681-82). Additionally, Hancock moved to admit certain testimony favorable to him, but adverse to Washington (id. at 682-83).[14/] The court stated that admission of this additional testimony would violate Washington's confrontation rights (id. at 683). Hancock then moved for a severance, but subsequently withdrew his motion and his request to admit this exculpatory portion of Mr. Sellers' testimony (id. at 683, 690, 705).

The government continued to press for admission of evidence that more broadly impeached Mr. Sellers' and Mr. Parrott's testimony. Specifically, the government sought to impeach Mr. Parrott's statement to the grand jury that he had never gambled at Greasy's with Mr. Sellers' grand jury statement that both Mr. Sellers and Mr. Parrott had, in fact, gambled at Greasy's (id. at 709). Hancock vigorously objected (id. at 710). Responding to the court's comment that the truncated form of the testimony as proposed by the defense was unfair to the government, Hancock

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[14/] Hancock wanted to introduce Mr. Sellers' testimony that, when he later purchased Washington's leather jacket, Hancock was not present (4/28/97 Tr. 682-83). The government's informant, Mr. Williams, had testified that Hancock was present when the coat was sold (4/25/97 Tr. 226; 4/28/97 Tr. 682-83).

said, to the contrary, the injury was to him because he had been denied the opportunity to examine witnesses who possessed exculpatory information (id.). Appellant joined with Hancock in his request to limit the grand jury testimony to Mr. Sellers' and Mr. Parrott's exculpatory statements that they did not discuss the embassy incident with defendants, arguing that the government should not be allowed to exploit the unavailability of these witnesses (id. at 714-15).

The court denied the government's request to impeach Mr. Parrott's statement about never gambling at Greasy's, finding that the matter was too collateral and that it would violate defendants' confrontation rights (4/29/97 Tr. 771, 773). Finding Mr. Sellers and Mr. Parrott unavailable, the court ruled that the defense would be allowed to enter into evidence only those portions of the grand jury testimony indicating that neither Mr. Sellers nor Mr. Parrott had spoken to defendants about the embassy incident (id. at 780).

Struggling to minimize the distortion to Mr. Sellers' and Mr. Parrott's testimony, the government pressed for admission of other portions of Mr. Parrott's grand jury testimony (id. at 780-85, 791). Denying these requests, the court again reproached the government for not disclosing the Brady information sooner and for its failure to ensure the availability of these two witnesses (id. at 794).

In the defense case, defendants read into evidence limited portions of the grand jury testimony of Mr. Sellers and Mr. Parrott (4/29/97 Tr. 823-26). The heavily redacted testimony stated that defendants did not discuss the embassy incident with them (id.). The government impeached their credibility by introducing evidence of their prior convictions (id. at 835-36).

B. Standard of Review and Applicable Legal Principles

Under Brady v. Maryland, 373 U.S. 83 (1972), and its progeny, the government is required to disclose exculpatory evidence to a defendant, including "[e]vidence that an accused can use to impeach a government witness." Card v. United States, 776 A.2d 581, 596 (D.C. 2001) (citation omitted). "[I]t is now well settled that the prosecution must disclose exculpatory material at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure." Edelen v. United States, 627 A.2d 968, 970 (D.C. 1993) (internal quotations and citation omitted).

Reversal based on a tardy disclosure of Brady evidence is warranted only if there was "a reasonable probability that, had the disclosure been made earlier, the result of the proceeding would have been different." Boone v. United States, 769 A.2d 811, 821 (D.C. 2001) (quoting Catlett v. United States, 545 A.2d 1202, 1217

(D.C. 1988)). Thus, there is no Brady violation if a defendant receives exculpatory information in time to use it effectively at trial. Catlett, 545 A.2d at 1217; see also Card, 776 A.2d at 597-98 (the requisite prejudice is lacking where defense was able to use Brady evidence).

C. Analysis

Despite its belated disclosure, appellant could and did make powerful use of Brady information at trial. As a result of the sanctions imposed by the court on the government, defendants mined the nuggets of exculpatory information from Mr. Sellers' and Mr. Parrott's testimony. Able to put on the transcript testimony of two impeachment witnesses without exposing them to the perils of cross-examination, the redactions distorted the testimony in favor of the defense. Appellant was therefore better situated than he would have been with their live testimony.

Moreover, despite its late disclosure, the Brady information was disclosed before opening statements were delivered and, thus, appellant was able to factor this information into his trial strategy. See Edelen, 627 A.2d at 971 (late disclosure of witness's potential Brady statement before opening statements allowed defense counsel to incorporate statement into his initial address). Additionally, the tardy disclosure of this information did not undermine appellant's alibi theory. Finally, the offer of

a continuance to help remedy the late disclosure was declined by appellant. Where appellant made effective use of the Brady information and turned down remedial measures offered to cure its untimely disclosure, there can be no reasonable probability that earlier disclosure would have affected the result, and thus reversal is not warranted.

The Court's decision in Curry v. United States, 658 A.2d 193 (D.C. 1995), is instructive here. In Curry, the government turned over to defendant exculpatory information two days before the initial trial date. 685 A.2d at 195-96. At that time, a witness, who had made a statement exculpating the defendant, could not be located and the trial was continued several months to allow the parties to find him. Id. at 196. On the eve of the rescheduled trial date, still unable to locate the witness, the defendant's attorney filed a motion to dismiss the indictment or, in the alternative, for sanctions. Id. As part of his request for sanctions, the defendant asked to be allowed to introduce portions of the witness's statement which contradicted testimony of government witnesses, acknowledging that the government would be deprived of the opportunity to cross-examine the witness. Id. After a hearing on the motion, the trial court found that timely disclosure of the witness's statement would have made no difference because the witness had already left the area and did not wish to

be located. Id. at 197. The court denied the motion for dismissal and found that defendant's proposed remedy of admitting an edited version of the statement without an opportunity for the government to cross-examine the witness would be an extreme measure. Id. Declining to sanction the government in this fashion, the case proceeded without the exculpatory evidence, and defendant was found guilty. Id.

In affirming the conviction, this Court held that the trial court did not abuse its discretion by failing to admit the edited version of the unavailable witness's statement. Id. at 199. Measured against Curry, the sanction imposed here by the court on the government was severe. As a result, appellant not only was allowed to introduce the grand jury testimony of Mr. Sellers and Mr. Parrott, but was also able to exclude those portions of the testimony that were damaging to his defense. Had either man testified at trial, the government would have had access to all of the testimony unfavorable to appellant, and both witnesses would have been substantially impeached.[15/]

[15/] Appellant contends that the edited versions of Mr. Sellers' and Mr. Parrott's testimony inured to the benefit of Washington and cites to additional portions of the grand jury testimony that would have benefitted him (Brief for Appellant at 27-28). However, at no time during the trial did appellant move to admit these additional portions. Indeed, some of the portions cited by appellant are portions that the government unsuccessfully sought to admit because they would have impeached Mr. Sellers and Mr. Parrott. Because appellant did not move to admit the portions he now contends on (continued...)

II. The trial court did not err in denying a mistrial motion based on the inadvertent admission of co-defendant's statement referring to appellant as a "pipehead," because the statement was struck from the record and was not before the jury in its deliberations.

Appellant contends that testimony about Washington's statement calling appellant a "pipehead" constituted a Bruton violation (Brief for Appellant at 36; Supplemental Brief for Appellant at 30-31). Additionally, appellant contends that the trial court should have granted his motion for a mistrial (Supplemental Brief for Appellant at 31-35). Because the "pipehead" statement was stricken from evidence and a curative instruction was immediately given, it did not constitute a Bruton violation and a mistrial was not warranted.

A. Background

Before trial, the parties agreed to redact from Washington's statements a comment describing appellant as a crack head (3/25/97 Tr. 293). During re-direct examination of Detective Williams, the following exchange occurred:

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[15]/(...continued)
appeal would have exculpated him, his claim must be reviewed for plain error. See (Kevin) Hunter v. United States, 606 A.2d 139, 144 (D.C.), cert. denied, 506 U.S. 991 (1992). Appellant has failed to demonstrate that the trial court plainly erred in not allowing these portions into evidence. To the contrary, by excluding these portions, the court vigilantly protected appellant's and his co-defendants' confrontation rights.

Prosecutor: Detective Williams, when you told Gary Washington that Maurice Sykes had told you everything and that wasn't true, why were you using that technique?

Williams: The reason I was doing that was that if - - in this case, there's more than one person arrested. And we had arrested Mr. Sykes prior to the interview of Mr. Washington. I thought that if I told him that Maurice, when he was arrested, told us the whole story, that might encourage him to admit his responsibility in the shooting.

Prosecutor: And once you said what you said about Mr. Sykes, to Mr. Washington, what was his response?

Williams: When I - - when I told him that we arrested Mo [appellant], and that he told us everything, that Gary was the shooter, he said that - - he said he wasn't going to say anything because Mo was a pipe-head, and that he would take his chances at court. (4/24/97 Tr. 71-72.)

At that point, appellant's attorney asked to approach the bench and objected to the "pipehead" statement, and moved for a dismissal of the charges or a mistrial (id. at 72-74). Appellant further contended that the statement had either been elicited intentionally by the prosecutor or uttered by Detective Williams in a retaliatory fashion (id. at 74, 77). Appellant also contended that the statement gave rise to a Bruton violation (id.). The prosecutor explained that she had not been attempting to elicit the pipehead statement, but rather had been attempting to elicit from Detective Williams that Washington had replied, "So you want me to

say I was on the steps of the embassy and I accidentally shot the kid" (id. at 75). As a remedy, the government urged the court to instruct the jury to disregard the comment (id. at 75-76).

Outside the jury's presence, the court recalled Detective Williams to the stand. Detective Williams acknowledged that the prosecutor had instructed him not to make the pipehead comment on direct examination, but that if there was a question on cross-examination that pertained to Washington's statement, then he could provide it (id. at 80). Detective Williams acknowledged that he knew appellant would be prejudiced by the statement, but did not believe it would prevent his trial from going forward (id. at 79).

The court recessed trial for the day, noting that it was disturbed that a statement had been uttered which suggested appellant was a crack user (id. at 88-89). The next day, the court indicated that it would strike the pipehead statement from the record, but denied the motion for mistrial, finding that appellant had "not been prejudiced to the extent that he could not receive a fair trial" (4/25/97 Tr. 102-03). Immediately upon resuming trial, the court gave the following jury instruction:

> Before we proceed with further testimony, let me just instruct you that I am striking from the record Detective Williams' testimony that Gary Washington allegedly told him that Maurice Sykes was a "pipe-head." Therefore, that testimony is no longer before you and you must, in your deliberations, assume that the statement was never made by Mr. Washington.

> The reason it is important that you not consider the testimony is because there will be no evidence presented to you that Maurice Sykes has ever used drugs. Therefore, it would be totally inappropriate for to you use Mr. Washington's alleged statement in deciding the guilt or innocence of the defendant. So please disregard that testimony and don't, in any way, consider that testimony in your deliberations in this case. (Id. at 127.)

B. Standard of Review

When inadmissible evidence has come before the jury, this Court reviews a denial of a motion for a mistrial for abuse of discretion. Carpenter v. United States, 430 A.2d 496, 506 (D.C. 1981), cert. denied, 454 U.S. 852 (1981). "A mistrial is a severe remedy - a step to be avoided whenever possible, and one to be taken only in circumstances manifesting a necessity therefor." Peyton v. United States, 709 A.2d 65, 69 (D.C.), cert. denied, 525 U.S. 854 (1998). In assessing the potential prejudice to appellant as a result of inadmissible evidence being inadvertently put to the jury, the Court looks to several factors: "the gravity of the misconduct, the relative strength of the government's case, the centrality of the issue affected, and any mitigating actions taken by the court, all the while giving due deference to the decision of the trial judge, who had the advantage of being present not only when the alleged misconduct occurred, but throughout the trial." Coleman v. United States, 779 A.2d 297, 302 (D.C. 2001) (citation omitted).

C. Analysis

Appellant contends that the pipehead statement gave rise to a Bruton violation because the prejudice was so egregious that a jury would have been unable to disregard the incriminating confession. This contention is meritless because Bruton involves admission of an incriminating confession against a defendant, while instructing the jury to disregard the confession in considering the co-defendant's case. Here, the statement was not admitted into evidence against either defendant.

In Bruton v. United States, 391 U.S. 123 (1968), an extensive confession by a non-testifying co-defendant was admitted into evidence at a joint trial of defendant and co-defendant. 391 U.S. at 124. The jury was instructed to consider the confession as evidence against the co-defendant, but not against the defendant. Id. at 125 n.2. The Supreme Court concluded that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional rights of cross-examination" where the confession was "powerfully incriminating." Id. at 135, 137. Significantly, however, the Court noted that "[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently.

'A defendant is entitled to a fair trial but not a perfect one.'" Id. at 135 (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)).

In this case the jury was not asked to perform the mental gymnastics condemned in Bruton - i.e., disregarding an incriminating confession in considering the evidence against a co-defendant, while considering the confession against the declarant. Instead, the pipehead statement was stricken from the record, meaning it was never part of the "body of evidence" that the jury could consider in assessing appellant's guilt. See Cruz v. New York, 481 U.S. 186, 190 (1987) ("a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt."). Because the statement was never actually in evidence for the jury to consider in deciding either defendant's guilt, the concern of Bruton is not implicated here.

By striking Washington's pipehead statement and instructing the jury immediately to disregard the harmful statement, the court took adequate steps to mitigate any prejudice to appellant. It is a bedrock "assumption of the law that jurors follow their instructions . . . ." Richardson v. Marsh, 481 U.S. 200, 206 (1987). Thus, it is presumed that the jury followed the judge's

instruction to disregard the statement, curing the inadvertent admission of the pipehead statement. See, e.g., Clark v. United States, 639 A.2d 76, 79-80 (D.C. 1994) (witness's brief, inadvertent statement that defendant had been previously incarcerated could have been cured by limiting instruction had defendant not rejected court's offer to give such an instruction). In these circumstances, the trial court did not abuse its discretion in denying appellant's motion for a mistrial. Goins v. United States, 617 A.2d 956, 958-59 (D.C. 1992) (no abuse of discretion in denial of mistrial motion after detective testified unexpectedly that defendant had a prior criminal record where curative instruction was given immediately).

Further, there was no government misconduct. The prosecutor represented that she was not attempting to elicit the pipehead statement from Detective Williams on redirect. Finally, there was ample evidence incriminating appellant. Mr. Ignatiev identified appellant as his assailant; Mr. Williams testified that appellant admitted to participating in the attempted armed robberies at the embassy; and the government introduced newspaper articles torn up by appellant as evidence of consciousness of guilt. Against this evidentiary backdrop, a single, unadmitted hearsay statement, which

the jury was instructed to disregard, does not constitute grounds for reversal.[16/]

III. The court did not abuse its discretion by refusing to suppress inculpatory evidence disclosed during trial.

Appellant contends that the trial court abused its discretion by allowing the government to introduce highly prejudicial evidence that was disclosed to appellant during trial (Brief for Appellant at 37-39; Supplemental Brief for Appellant at 27-30). Appellant's argument is groundless.

A. Background

Appellant made a pretrial discovery request for material documents and tangible objects (R1. 27 at 1). Six days into the trial, on April 17, the government notified appellant that it had just learned of new inculpatory evidence against him (4/17/97 Tr. 282). The prosecutor represented that Detective Williams had informed her that when appellant was extradited from Maryland to D.C. in November 1995, and temporarily placed in an interview room at police headquarters, Detective Williams observed appellant

[16/] Although appellant briefly contends that the trial court erred in not severing his case initially (Supplemental Brief for Appellant at 31), he does not develop this issue. Accordingly, the Court should not consider this undeveloped argument. See D.C. App. R. 28(a)(5) ("The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on"); see also Brown v. United States, 675 A.2d 953, 955 (D.C. 1996) (declining to consider defendant's argument where defendant failed to comply with Rule 28(a)(5)).

tearing up some papers and placing them in a trash can (id. at 283). Detective Williams later retrieved what turned out to be pieces of newspaper articles concerning the crimes on trial (id.). Instead of placing these articles in the lead homicide file on the case, Detective Williams placed the articles in another file he kept relating to offenses committed in the Dupont Circle area (id.). Going through both files in preparation for testifying at trial, Detective Williams found these articles and realized that he had not informed the prosecution of their significance (id.).[17/]

The government argued for the admission of this evidence as consciousness of guilt, and appellant opposed, arguing that Rule 16 had been violated (id. at 284-85). The court inquired as to how appellant was prejudiced, and appellant argued that, had he known of the existence of the articles, he would have delivered a different opening statement (id. at 287). As a tentative solution, the court offered appellant the opportunity to re-open before the evidence was offered (id. at 289). While reserving ruling on the admission of the articles, the court indicated that, as a condition

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[17/] During a voir dire examination, Detective Williams testified that he gave the file containing the articles to the prosecutor early in the case but never alerted her to the significance of the articles (4/18/97 Tr. 448-49, 458). Corroborating the detective's testimony, the prosecutor represented to the court that she had seen the articles previously, but had attached no significance to them (id. at 486).

to allowing their admission, the government would have to reopen any plea offer previously given to appellant (id. at 337).

Appellant subsequently declined the offer to re-open, but requested an instruction concerning the late disclosure by the government of this evidence (4/18/97 Tr. 495-96). The court agreed to give such an instruction (id. at 496).[18/] Appellant moved for severance and a mistrial as a result of the ruling allowing the admission of the newspaper articles (id. at 531). Additionally, appellant argued that it was now paramount that he be allowed to fully attack Detective Williams' credibility by bringing out information which the parties had previously agreed to exclude (id. at 532). Over the government's objection, the court allowed appellant to bring out on cross-examination that Detective Williams had lied to both Hancock and Washington during their interrogations to enable him to argue that the detective had also lied about recovering the newspaper articles (id.).

Before Detective Williams testified about the newspaper articles, the court gave the following instruction to the jury:

[18/] The court was also concerned that appellant might be prejudiced by his inability to fingerprint the articles as a result of the late disclosure and offered appellant the opportunity to have the articles fingerprinted (id. at 488-89), but appellant declined the offer (id. at 495). The next trial day, the government requested that it be allowed to fingerprint the articles (4/21/97 Tr. 509). After consultation with his counsel, appellant decided that he did not want the articles fingerprinted (id. at 526).

> Detective Williams will testify that Mr. Sykes was arrested on November 2, 1995, and held in Prince Georges County, Maryland, until November 17, 1995, when he was transferred to the Metropolitan Police Department, Homicide Division.
>
> While Mr. Sykes was there, Detective Williams will testify that Mr. Sykes allegedly had newspaper articles in his possession which he tore up and discarded in a trash can.
>
> Detective Williams allegedly recovered those pieces of paper. The government was obligated to turn over the newspaper articles to counsel for Mr. Sykes for his inspection and examination in May of last year when this case was indicted.
>
> The government failed to do that and only made [appellant's trial counsel] aware of the newspaper articles on Thursday of last week, April 17, 1997.
>
> You may take that into consideration when evaluating Detective Williams' credibility. (4/21/97 Tr. 569.)

On cross-examination, appellant elicited that Detective Williams had lied to both Hancock and Washington about what appellant had allegedly said to the police (4/23/97 Tr. 203). In his closing argument, appellant argued that, because Detective Williams had lied to his co-defendants, the jury should throw out his testimony (4/30/97 Tr. 35).

B. Standard of Review and Legal Principles

The decision whether to declare a mistrial is reposed in the trial judge's sound discretion. Rambert v. United States, 602 A.2d 1117, 1120 (D.C. 1992). "A mistrial is a severe remedy," one to be taken only in circumstances that "manifest[] a necessity therefor."

Peyton, 709 A.2d at 69. The Court also reviews a claim that the trial court failed to impose an adequate sanction for a violation of Super. Ct. Crim. R. 16(a)(1)(C) for abuse of discretion.[19/] Gethers v. United States, 684 A.2d 1266, 1272 (D.C. 1996), cert. denied, 520 U.S. 1180 (1997).

Rule 16(d)(2) provides in pertinent part, "If . . . a party has failed to comply with this Rule, the Court . . . may grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other orders as it deems just under the circumstances." The range of available options provided by Rule 16(d)(2) is "extremely broad," the only limitation "being that a sanction must be 'just under the circumstances.'" Davis v. United States, 623 A.2d 601, 605 (D.C. 1993) (citation omitted).

Because Super. Ct. Crim. R. 16 is "substantially the same as its federal counterpart (Fed. R. Crim. P. 16), it is to be construed consistently with the federal rule, and this Court may look to relevant federal precedents for guidance." United States v. Curtis, 755 A.2d 1011, 1014 (D.C. 2000). Although Rule 16 gives

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[19/] Super. Ct. Crim. R. 16(a)(1)(C) states in pertinent part:

> Documents and Tangible Objects. Upon request of the defendant the prosecutor shall permit the defendant to inspect . . . documents . . . which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

trial judges the option of suppressing evidence as a result of the government's discovery violations, such a severe sanction is seldom appropriate where the trial court finds that the government's violation did not result from bad faith and that a less drastic remedy, such as a continuance, will mitigate any unfair prejudice. Marshall v. United States, 328 U.S. App. D.C. 8, 132 F.3d 63, 70 (1998). A defendant is entitled to a new trial only if the discovery violation prejudiced his or her "substantial rights." United States v. Brodie, 276 U.S. App. D.C. 328, 332, 871 F.2d 125, 129 (1989).

C. Analysis

There was no attempt to ambush appellant by disclosing the articles during trial. Instead, the late disclosure was the result of a ministerial filing error. Once brought to its attention, the government immediately turned the information over to appellant. Suppression of the evidence in these circumstances would have been inappropriate. Further, appellant rejected remedial proposals to cure any discernible prejudices: he declined the court's offer to re-open and/or to have the articles fingerprinted. Nevertheless, the court's curative measures minimized any harm caused to appellant. First, the court informed the jury of the circumstances surrounding the late disclosure, thereby eliminating any risk that the jury would penalize appellant for not attacking this evidence

in his opening. Second, the court gave appellant license to use the full arsenal of available impeachment evidence to discredit Detective Williams' testimony. These measures eliminated any harm associated with the untimely disclosure of this evidence. In these circumstances, a mistrial would have been an extreme and unnecessary remedy.

Appellant has not demonstrated that his substantial rights were prejudiced as a result of the belated disclosure of this evidence. By declining to avail himself of the measures offered below to cure any harm caused by the late disclosure, appellant's request for relief on appeal should be rejected.[20/]

IV. Appellant knowingly and voluntarily waived his right to testify.

Appellant claims reversible error because he was denied his Fifth Amendment right to testify (Brief for Appellant at 40-43; Supplemental Brief for Appellant at 41-44). His argument is groundless.

A. Background

None of the defendants testified at trial and a jury instruction was given concerning the absence of their testimony (4/28/97 Tr. 697; 4/30/97 Tr. 104). The record does not indicate

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[20/] Appellant contends that the court should not have allowed the government to introduce the articles in its case-in-chief (Brief for Appellant at 39). However, appellant never requested this relief below, and the court did not plainly err in allowing the government to introduce the articles in its case-in-chief.

that a Boyd inquiry was conducted. See generally Boyd v. United States, 586 A.2d 670 (D.C. 1991).

On June 11, 1997, appellant filed pro se a motion captioned, "Motion to Compel Ineffective Assistance of Counsel" (R2. 16). He filed a pro se motion to vacate his sentence on January 2, 1998 (R2. 15 at 4). In his motions, appellant alleged, inter alia, that his "[c]ounsel failed to allow Mr. Sykes to testify on his own behalf" (R2. 15 at 4). In his pro se reply to the government's opposition to his motion to vacate, appellant stated that he "did inform counsel of his desire to testify, but counsel strongly advised [him] not to take the stand" (R2. 22 at 2).

The court denied appellant's motions (R2. 2 at 3; R4. 8). In a footnote to its order, the court addressed appellant's contention that his trial counsel prevented him from testifying and that "he did not appreciate his right to testify in his own behalf" (R4. 8 at 4 n.4). The court recalled advising appellant of his right to testify (id.). Unable to substantiate this fact after a review of the record, however, the court instructed the government to review the trial transcripts and advise the court whether its recollection was correct (id.). Regardless of the results of such a review, the court stated that appellant had failed to demonstrate ineffective assistance of counsel (id.). After a review of the trial transcripts, the government reported that it was unable to find an

indication in the available record that the court had conducted a Boyd inquiry into appellant's waiver of his right (R4. 18 at 5). On November 6, 2000, appellant filed a motion to vacate the court's order denying his § 23-110 motion (R4. 1 at 47, 17).

The court held an evidentiary hearing on appellant's motion on May 15 and 23, 2001. Represented by new counsel, appellant testified at the hearing that he told his trial counsel that he wanted to testify on his own behalf (5/15/01 Tr. 31). Appellant said his counsel informed him that it would not be a "good idea" to testify, and at one point, affirmatively said appellant could not testify (id. at 36, 38). Appellant admitted that he had two prior narcotics convictions and, based on this criminal record, his attorney told him not to testify (id. at 52-53). Appellant stated that in neither of the narcotics cases did his lawyers discuss his right to testify at trial (id. at 58-59). However, appellant explained that in at least one of the cases he entered an "Alford plea" (id. at 59). Appellant called Gary Washington who testified that he heard appellant tell his trial counsel that he wanted to testify (id. at 24). Mr. Washington stated that he did not recall being advised by the court of his right to testify (id. at 29).

The government called appellant's trial counsel, Bernard Grimm, who testified that appellant never indicated to him his

desire to testify (id. at 95-96). To the contrary, Mr. Grimm stated that appellant understood he had a right to testify if he wanted to, but did not want to testify because he had a criminal record (id. at 94, 97). Mr. Grimm denied telling appellant that he would not permit him to testify (id. at 98). Court Security Officer (CSO) Carl Ballard, Sr. testified that he recalled the trial court asking each defendant if he wanted to testified and each answering "no" (5/23/97 Tr. 37).

In denying appellant's motion, the court credited Mr. Grimm's testimony and found that appellant "was sufficiently advised of his right to testify" and "that he knowingly and voluntarily waived his right to do so" (R4. 60 at 6). The court explicitly found appellant's testimony not credible (id. at 10). The court also cited appellant's substantial correspondence with the court, his familiarity with the criminal justice system, and his representation by numerous attorneys as proof that appellant was aware of his right to testify (id. at 9-10, 15). The court further stated that, while it was not recorded in any available transcript, it recalled conducting a Boyd inquiry (id. at 6).

B. Standard of Review and Applicable Legal Principles

A defendant has a fundamental and personal right to testify in his or her own defense. Rock v. Arkansas, 483 U.S. 44, 49-52 (1987). This right can only be waived by the defendant. Boyd, 586

A.2d at 674. A waiver of this right must be knowing and voluntary. Id. at 678. While "it behooves the trial court to make [] an on-the-record inquiry," id. at 678, of a non-testifying defendant to determine if the defendant has waived the right to testify, there is no requirement that a defendant make an on-the-record waiver of his right to testify. Moctar v. United States, 718 A.2d 1063, 1068 (D.C. 1998); see also Woodward v. United States, 626 A.2d 911, 915 (D.C. 1993) (no requirement that trial judge engage in on-the-record colloquy to ensure the defendant has knowingly and intelligently waived the right to testify). "In effect, the failure of the defendant to take the stand in his own defense at trial is, so to speak, treated as a presumed valid waiver of the right to testify." Moctar, 718 A.2d at 1068.

However, if a defendant raises a post-conviction challenge based on a claim of a denial of the right to testify, then an appropriate inquiry should be made into the claim. Woodward, 718 A.2d at 915; see also Moctar, 718 A.2d at 1068. During such a post-conviction inquiry, the trial court has "'a duty to determine whether' the defendant 'ha[s] made a knowing and intelligent waiver' of [the] right to testify." Moctar, 718 A.2d at 1069 (quoting Boyd, 586 A.2d at 677). A judge's post-conviction finding that a defendant cooperated with his or her trial counsel and accepted advice not to testify is the equivalent of a finding that

the defendant gave a knowing and voluntary waiver. (Tony) Kelly v. United States, 590 A.2d 1031, 1035 (D.C. 1991).

"Whether a defendant has validly waived his or her right to testify will depend on the particular circumstances of each case." (John E.) Hunter v. United States, 588 A.2d 680, 681 (D.C.), cert. denied, 502 U.S. 892 (1991). The factors considered by the Court in this analysis include a defendant's prior experience in the criminal justice system, id. at 681, and a defendant's demonstrated ability to assert his rights, Kelly, 590 A.2d at 1034.

C. Analysis

Appellant's own, unvarnished words undercut his claim on appeal. Appellant admitted in a pro se filing that he knew of his right to testify, but that his "counsel strongly advised [him] not to take the stand" (R2. 22 at 2). Thus, his claim should be rejected. Even without this admission, the trial court found as a matter of fact that appellant was advised of his right and knowingly and voluntarily waived that right. In making its findings, the court expressly discredited appellant's testimony to the contrary. Appellant has presented no reason to disturb the court's credibility finding. See Nche v. United States, 526 A.2d 23, 24 (D.C. 1987) (trial judge's determination of credibility upheld unless plainly wrong or without evidence to support it).

In addition to the factual finding of a knowing and voluntary waiver, other evidence in the record bolsters a finding of a constitutional waiver. Having twice pleaded guilty to offenses in Maryland, appellant was familiar with the criminal justice system. While appellant never went to trial in either case, he demonstrated a level of sophistication with the system in using a lawyer's vernacular to describe one of his pleas as an "Alford plea" (5/15/01 Tr. 59). Moreover, the court noted that appellant's correspondence demonstrated a level of intelligence, an appreciation of the law, and a tireless persistence in informing the court about his views concerning the court's rulings (R3. 60 at 11-13). Letters penned by appellant pre-trial also revealed his degree of involvement and familiarity with certain legal aspects of his case (See R1. 47, 59, 62).[21/] Finally, the court inferred from the multiple attorneys that had represented appellant pre- and post-conviction that appellant remained zealous in his efforts to obtain better legal representation, undercutting his argument that he did not know how to maneuver in the legal system and was unaware of his right to testify.

[21/] Appellant contends on appeal that because his counsel at the evidentiary hearing was not aware of these letters, and thus did not have an opportunity to address them, this Court should not consider them as evidence (Brief for Appellant at 42). Appellant's contention that his counsel lacked notice is contradicted by the record on appeal, which indicates that several of appellant's letters were filed in the court jacket and that copies were made available to all the parties (R1. 1 at 15, 17).

Appellant's argument rests mistakenly on the trial court's presumed failure to conduct a Boyd inquiry (Brief for Appellant at 40). But this Court has never imposed a requirement that an on-the-record inquiry be conducted by the trial court. Moctar, 718 A.2d at 1068; see also id. at 1066 n.7; Woodward, 626 A.2d at 915. Indeed, the case law specifically contemplates that in the absence of an on-the-record trial inquiry, a post-conviction inquiry into a defendant's waiver of the right to testify will be necessary. Kelly, 590 A.2d at 1035. The court appropriately conducted such an inquiry and found that appellant's waiver was knowing and voluntary. That finding should not be disturbed.

V. The lineup identification of appellant was not the result of impermissible suggestivity.

Appellant challenges the lineup in which he appeared as impermissibly suggestive because of the alleged disparity in the appearances of the lineup participants and because he was the only lineup participant in shackles (Brief for Appellant at 43; Supplemental Brief for Appellant at 37). Appellant's argument is without merit and should be rejected.

A. Background

Mr. Ignatiev identified appellant in a December 14, 1995 lineup (1/14/97 Tr. 233). Appellant filed a motion to suppress this pretrial identification, challenging the disparity in appearance of the lineup participants (R1. 44). In his motion,

appellant contended that he was the only lineup participant who remotely fit the description given by the witnesses (R1. 44 at 3). Specifically, appellant argued that he was the only participant who had "a broad face with large round eyes"; that he was only one of three participants within the age group described by the witnesses; and finally, that the lineup was comprised of only seven individuals (id. at 3-4). At the hearing on his motion, appellant also contended he was the shortest person in the lineup (1/14/97 Tr. 233). Since Mr. Ignatiev had described one of his attackers as tall and the other as short, appellant argued that a person viewing the lineup would have been drawn to the shorter lineup participants (id.).

Appellant also argued that the lineup was unduly suggestive because he was the only lineup participant wearing leg irons (id. at 234; 12/19/96 Tr. 83). Appellant contended that, because Mr. Ignatiev walked up to the "stage" while viewing the lineup, he could have seen the leg irons (1/14/97 Tr. 234). Although appellant conceded that the leg irons were not visible in the photograph of the lineup, he asserted it was uncertain what could have been seen by a witness (id. at 235). The court stated that it had viewed the videotape of the lineup, and did not know what Mr. Ignatiev would have been able to see once he walked up to the platform (id.). However, the court inferred that the leg irons

were not visible from the fact that Mr. Ignatiev, upon walking up to the platform, did not immediately identify appellant (id.). At trial, appellant did not inquire of Mr. Ignatiev whether he saw leg irons on appellant during the December 14th lineup.

With respect to his contention that he was the shortest lineup participant, the court found that appellant was only "marginally shorter" than the other participants and that "the slight difference in size" was not sufficient to establish that the lineup was impermissibly suggestive (id. at 236). Further, the court found that there was nothing so unique about appellant's facial appearance that would have made him stand out (id. at 237). Accordingly, the court denied appellant's motion to suppress the lineup identification (id. at 237).

B. Standard of Review and Applicable Legal Principles

A successful motion to suppress pretrial identification must satisfy a two-part test. First, a defendant must establish that "the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." Maddox v. United States, 745 A.2d 284, 292 (D.C. 2000) (citation omitted). Second, if impermissible suggestivity is established, the government may defeat the motion by "producing evidence to show that, under all the circumstances, the identification was reliable nonetheless." Id. Reliability of an identification is predicated

upon "[(1)] the opportunity of the witness to view the criminal at the time of the crime, [(2)] the witness's degree of attention, [(3)] the accuracy of the witness's prior description of the criminal, [(4)] the level of certainty demonstrated by the witness at the confrontation, and [(5)] the length of time between the crime and the confrontation." Neil v. Biggers, 409 U.S. 188, 199-200 (1972). "This court is bound by the trial court's findings on whether identification procedures were impermissibly suggestive and whether an identification was reliable 'if they are supported by the evidence and in accordance with law.'" Turner v. United States, 662 A.2d 667, 672 n.3 (D.C. 1993) (citations omitted).

C. Analysis

Appellant fails to establish that the lineup was impermissibly suggestive. A review of the photograph of the lineup supports the trial court's finding of no suggestivity.[22/] Appellant is only marginally shorter than most of the lineup participants. Further, appellant appeared in a lineup with other black males of similar age and physical characteristics. Nothing about this lineup "would direct [a] witness' attention to a particular individual, which must be the subject of [the Court's] focus." Jackson v. United

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[22/] The government has moved to supplement the record with a true and accurate copy of the color photograph of appellant's lineup. See Appellee's Motion to Supplement the Record.

States, 623 A.2d 571, 589 (D.C.), cert. denied, 510 U.S. 1030 (1993).[23/]

Further, appellant's claim that Mr. Ignatiev saw leg irons on him is without support. Appellant conceded that the lineup photos do not show appellant wearing leg irons, and appellant presented no evidence that Mr. Ignatiev could see the irons. Appellant's argument, thus, is based on pure conjecture about what Mr. Ignatiev might have seen and must be rejected.

Even if appellant had demonstrated that the lineup was suggestive, which it was not, Mr. Ignatiev's identification has all the indicia of reliability to support its admission. Mr. Ignatiev said that the steps of the embassy, where he was attacked by appellant, were well lighted (4/15/97 Tr. 63). His assailant was directly on top of him, giving him a "very good look" at his attacker (4/15/97 Tr. 7-8). While Mr. Ignatiev did not remember the short time between being grabbed by his assailants and falling on the steps, he was able to get a look at the shorter of the two assailants who was beating him (id. at 7-9). Mr. Ignatiev's description of his attacker as having a broad head and large, round eyes was not challenged as a description that did not match

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[23/] With respect to appellant's contention that the lineup was unduly suggestive because there were only seven participants, appellant has failed to establish why this number in these circumstances proves impermissible suggestivity. Cf. Messer v. Roberts, 74 F.3d 1009, 1016 (10th Cir. 1996) (three-man lineups are not unconstitutional in and of themselves).

appellant. At the lineup, Mr. Ignatiev stated he thought the man wearing shield number four, appellant, was his attacker. At trial, Mr. Ignatiev expressed absolute certainty in his identification and said that he recognized appellant as soon as he walked in the viewing room (4/15/97 Tr. 21).[24/] This certainty is bolstered by the fact that Mr. Ignatiev made no prior identification at the showup conducted shortly after the incident on October 23.[25/] See Biggers, 409 U.S. at 201 (reliability of victim's identification of attacker was shored up by the fact that the victim had made no previous identification at any of the showups, lineups, or photographic showings). Finally, the elapsed time between the incident and the lineup was slightly under two months. See, e.g., Biggers, 409 U.S. at 201 (upholding finding of reliability of showup identification made seven months after the crime); McClain v. United States, 460 A.2d 562, 567 (D.C. 1983) (lineup identification four months after robbery permissible). Indeed,

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[24/] Undisputed trial testimony may be considered in determining whether or not error was committed in ruling on a pretrial motion to suppress evidence. (Thomas) West v. United States, 604 A.2d 422, 427 (D.C. 1992).

[25/] Appellant contends that Mr. Ignatiev's lineup identification was rendered less reliable because no other witness identified him in the lineup (Supplemental Brief for Appellant at 39). But the other witnesses on the steps of the Bulgarian Embassy, Mr. Kitanov and Mr. Enchev, testified that they did not get a good look at Mr. Ignatiev's attacker (4/14/97 Tr. 281; 4/16/97 Tr. 26, 28-29, 96). Thus, their failure to identify appellant has no impact on the reliability of Mr. Ignatiev's identification.

appellant concedes that this amount of time does not render the identification unreliable (Supplemental Brief for Appellant at 39). In these circumstances, Mr. Ignatiev's identification of appellant was properly admitted into evidence.[26/]

VI. The evidence was sufficient to show that appellant aided and abetted felony murder, attempted armed robbery, and PFCV.

Appellant challenges the sufficiency of the evidence on his convictions as an aider and abettor for felony murder, CPWL, PFCV, and attempted robbery of Mr. Ignatiev while armed (Brief for Appellant at 46; Supplemental Brief for Appellant at 45-49). The government concedes that there was insufficient evidence to convict appellant of CPWL.[27/] Appellant's remaining sufficiency challenges are without merit.

A. Standard of Review and Legal Principles

In evaluating evidentiary sufficiency, this Court views "the evidence in the light most favorable to the government and

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[26/] Appellant's remaining contention that the identification should be suppressed because Mr. Ignatiev did not make an in-court identification is contrary to case law. This Court has previously held that prior extrajudicial testimony is admissible "even though the declarant at trial was not asked to make an in-court identification." Beatty v. United States, 544 A.2d 699, 702 (D.C. 1988).

[27/] To be convicted of CPWL on an aiding and abetting theory, evidence must be introduced that the principal was not licensed to carry the pistol. See, e.g., Halicki v. United States, 614 A.2d 499, 503-04 (D.C. 1992). The government did not introduce any evidence that Washington, the principal, was not licensed to carry a pistol.

inquire[s] whether a reasonable person could find guilt beyond a reasonable doubt." (James) Kelly v. United States, 639 A.2d 86, 89-90 (D.C. 1994). In so doing, the Court must give "deference to the fact finder's right to weigh the evidence, determine the credibility of witnesses, and draw inferences from the evidence presented." Patton v. United States, 633 A.2d 800, 820 (D.C. 1993) (internal citations omitted). This Court will reverse a conviction on the basis of insufficient evidence only if "there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." In re R.H.M., 630 A.2d 705, 707 (D.C. 1993) (citation omitted).

B. Analysis

1. Felony Murder

Appellant contends that the government failed to present sufficient evidence that he aided and abetted co-defendant Washington, the shooter, in the attempted armed robbery of Mr. Mihailov (Supplemental Brief for Appellant at 45).

It is well settled that "[o]ne who aids and abets another in committing a criminal offense is chargeable as a principal for all acts committed 'in furtherance of the common purpose, if the act done is either within the scope of that purpose, or is the natural or probable consequence" of the underlying felony. Lee v. United States, 699 A.2d 373, 384-85 (D.C. 1997). A conviction of a

defendant based on a theory of aiding and abetting will stand if the government proves that "(1) the offense was committed by someone, (2) that the accused participated in the commission, and (3) that he did so with guilty knowledge." (Benson) West v. United States, 499 A.2d 860, 865 (D.C. 1985) (citations omitted).

The elements of felony murder are well established:

> First, the defendant or an accomplice must have inflicted injury on the decedent from which [he] died. Second, the injury must have been inflicted in perpetration of a specified felony. No distinction [is] made between the principals and aiders and abettors for purposes of felony murder liability. Only intent to commit the underlying felony need be proved.

Lee, 699 A.2d at 385 (citations omitted); see also D.C. Code § 22-2401 ("Whoever . . . kills another purposely . . . in perpetrating or attempting to perpetrate an offense punishable by imprisonment, or without purpose to do so kills another in perpetrating or attempting to perpetrate . . . robbery . . . is guilty of murder in the first degree").

Thus, the intent requirement for murder is met in a case against an aider and abettor if the aider and abettor's participation in the felony that resulted in the killing is demonstrated. Prophet v. United States, 602 A.2d 1087, 1095 (D.C. 1992). "[I]f one of several confederates commits a homicide while engaged in the commission of a felony, all may be found guilty of

felony murder, even if the killing is unintentional." Christian v. United States, 394 A.2d 1, 48 (D.C. 1978), cert. denied sub nom., Clark v. United States, 442 U.S. 944 (1979).

The government must establish "some causal connection between the homicide and the underlying felony." (Charles) Johnson v. United States, 671 A.2d 428, 433 (D.C. 1995) (emphasis in original). This requirement can be met by showing that the underlying felony and the killing were "all part of one continuous chain of events." West, 499 A.2d at 866. However, the aider and abettor is not criminally liable if the "homicide is a fresh and independent product of the killer's mind, outside of, or foreign to the common design." Christian, 394 A.2d at 48-49. Thus, the killing must have occurred in "the execution of the common scheme or plot." Id. at 48.

The felony murder charge here was predicated on the attempted armed robbery of Mr. Mihailov. Viewed in the light most favorable to the government, a jury could reasonably have found that appellant was integral to the commission of this felony and to the shooting. Witnesses described a gold-colored car driving by the embassy before the attempted robberies occurred, leading to a reasonable inference that appellant and the shooter, co-defendant Washington, were plotting to rob the men on the embassy steps. Appellant and co-defendant Washington then approached the embassy

together and jointly attacked and attempted to rob Mr. Ignatiev on the embassy steps. During this attack, co-defendant Washington, the shooter, had his gun drawn. Washington then turned to the other men on the embassy steps and, brandishing the gun at them, demanded money. A few feet away, appellant continued his assault on Mr. Ignatiev. Even assuming appellant had not known a gun was going to be used in the robbery, after the gun was displayed, he continued to participate in the criminal enterprise by beating Mr. Ignatiev. In these circumstances, appellant was not a neutral presence. To the contrary, by attacking and attempting to rob Mr. Ignatiev a few feet away from where the shooter was standing, and by his clear association with the shooter, appellant acted in furtherance of the joint scheme to rob the men on the embassy steps. (Benson) West, 499 A.2d at 866 (defendant found to be aider and abettor to felony murder, where he initiated confrontation, called others including the shooter over to the scene, and was pacing back and forth within a few feet of the armed robbery victims as the victims were being searched).

Moreover, appellant could have withdrawn from the scene after it was clear that Washington was demanding money and brandishing a gun at the other men on the embassy steps, including Mr. Mihailov. Instead, appellant continued his assault on Mr. Ignatiev. Based on this evidence, the jury could have reasonably found "that by not

availing himself of opportunities to withdraw from the scene," appellant "gave his tacit approval and encouragement to what [Washington] was doing," and "thereby aid[ed] and abett[ed] the criminal enterprise." Lee, 699 A.2d at 373. Finally, appellant's statements later that night at Greasy's support a contention that the attempted armed robberies and the shooting were "all part of one continuous chain of events." (Benson) West, 499 A.2d at 866. At Greasy's, appellant talked about beating up Mr. Ignatiev for his watch, and demonstrated his assault by shadow boxing. Washington talked about busting up another guy over a jacket and shooting him. All three men, the shooter, Hancock, and appellant laughed as they told their stories of what happened at the embassy.

In these circumstances, appellant's characterization of the attempted armed robbery of Mr. Mihailov as a separate and distinct crime is unsupportable. A reasonable jury could find that the shooting of Mr. Mihailov was a means of facilitating the attempted armed robberies that appellant and Washington were perpetrating, and thus, that the attempted armed robbery of Mr. Mihailov and his killing were linked by an "unbroken chain of facts." Lee, 699 A.2d at 386.

2. Attempted Armed Robbery

Appellant contends that while the evidence may have been sufficient to convict him of attempted robbery, it was not

sufficient to convict him of attempted robbery while armed (Brief for Appellant at 48). The elements of attempted armed robbery are that "(1) the defendant committed an act which was 'reasonably designed' to commit the crime of robbery; (2) at the time the act was committed, the defendant acted with the specific intent to commit the offense of robbery; and (3) the act went beyond mere preparation as the defendant came 'dangerously close' to completing the crime of robbery." (Earl) Johnson v. United States, 756 A.2d 458, 463 n.3 (D.C. 2000). Additionally, the government must establish that a defendant, at the time of the offense, was armed with a firearm. Lattimore v. United States, 684 A.2d 357, 360 (D.C. 1996). To find appellant guilty as an aider and abettor to attempted armed robbery, appellant must have reasonably foreseen that a weapon would be required to commit the robbery. Ingram v. United States, 592 A.2d 992, 1003 (D.C.), cert. denied, 502 U.S. 1017 (1991).

The government is not required to offer direct proof of knowledge by the aider and abettor that the principal was armed. Hordge v. United States, 545 A.2d 1249, 1256 (D.C. 1988). "[I]t is sufficient if there is evidence to support a reasonable inference that the accomplice was aware the crime would be committed 'while armed.'" Id. (citation omitted). An aider and abettor to a felony "is legally responsible for all acts of the other persons which are

in furtherance of the common purposes, design, or plan to commit the felony. . . ." Id.

Appellant asserts that he was not in actual or constructive possession of a firearm during the attempted robbery, but the government's theory of his guilt was based on aiding and abetting, not possession, and the evidence was sufficient to support an inference that appellant was aware that a gun would be used to commit the robbery. Mr. Kitanov testified that, while holding a gun, Washington attacked Mr. Ignatiev along with appellant. Because Washington's gun was clearly visible, it is reasonably inferrable that appellant, Washington's cohort, was also aware of it. At no point, however, did appellant abandon the criminal enterprise because his partner in crime was armed. Further, the jury reasonably could have inferred that appellant became aware of the gun while appellant, Washington, and Hancock were riding together in Hancock's car before committing the robbery. See (James) Kelly v. United States, 639 A.2d 86, 92 (D.C. 1994) ("jury could reasonably have found that it was unlikely the weapons [used to commit armed robbery] would have been concealed from appellant during the two hours that the [] men were together [].").

3. PFCV

The elements of PFCV are: "(1) the defendant committed a crime of violence; (2) during the commission of the crime of violence,

the defendant possessed a firearm; and (3) that he did so knowingly and intentionally." McCullough v. United States, 827 A.2d 48, 58 (D.C. 2003); see also D.C. Code § 22-3204(b). A conviction for aiding and abetting PFCV requires proof that "1) a crime was committed by someone; 2) appellant assisted or participated in its commission; and 3) he did so with guilty knowledge." McCullough, 827 A.2d at 58; see also Dang v. United States, 741 A.2d 1039, 1043 (D.C. 1999) (to establish aiding and abetting of PFCV, a defendant must be present and "knowingly act in furtherance of the common purpose in an effort to make the venture succeed").

Here, the evidence showed that appellant and Washington set out on a joint criminal venture to commit armed robbery. Appellant was a full participant in this venture, approaching Mr. Ignatiev with Washington and jointly assaulting him. During the attack and attempted robbery, Washington was holding a gun as he and appellant punched Mr. Ignatiev. When Mr. Ignatiev attempted to crawl away, appellant prevented him. As part of this joint venture to rob, Washington brandished his gun at the other Bulgarian men standing on the steps of the embassy, as well as at Mr. Ignatiev. Ultimately, Washington shot and killed Mr. Mihailov. After the shooting, appellant fled the scene with Washington. This evidence was more than sufficient to convict appellant on a charge of PFCV on an aiding and abetting theory. See Dang, 741 A.2d at 1043

(affirming defendant Dang's conviction for PFCV on aiding and abetting theory where Dang entered and exited apartment with his co-defendants armed with guns and, while in the apartment, worked in concert with them by blocking the exit door, guarding one victim, and pointing a knife at another); see also McCullough, 827 A.2d at 59 (evidence that defendant McCullough participated in planning of murder and fled the scene of the crime with his armed co-defendant supported sufficiency of evidence on McCullough's conviction as aider and abettor of PFCV and first-degree murder while armed).[28/]

Appellant misplaces his reliance on cases in which defendants were convicted of PFCV on a theory of constructive possession. The government's theory of guilt, as already noted, was that appellant

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[28/] Appellant also contends that there was insufficient evidence that he knew, or had reason to know, that Washington was armed with a firearm within the meaning of D.C. Code § 22-3202(a)(1), and therefore, he should not have received mandatory-minimum sentences for felony murder, attempted armed robbery, and PFCV (Supplemental Brief for Appellant at 49). An unarmed aider and abettor can receive a mandatory minimum term of imprisonment under the sentencing enhancement provisions of § 22-3202 "so long as the person abetted conceitedly was" armed. (Phillip) Johnson v. United States, 686 A.2d 200, 205 n.5 (D.C. 1996); see also Abrams v. United States, 531 A.2d 964, 966 (D.C. 1987) (§ 22-3202 "does not require proof that an accomplice have actual, personal possession of a pistol" to receive a mandatory-minimum sentence). As demonstrated above, appellant aided and abetted Washington in the attempted armed robbery of Mr. Ignatiev and Mr. Mihailov. Washington was "concededly" armed. Therefore, the evidence was sufficient to enhance appellant's sentences under § 22-3202 as an aider and abettor.

was an aider and abettor. Thus, the cases relied upon by appellant are inapposite.[29/]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the Superior Court should be affirmed, except that the case should be remanded for vacation of the underlying felony to the felony murder conviction and the CPWL conviction.

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[29/] The government agrees that appellant "cannot remain sentenced . . . for both felony murder and the underlying felony," Catlett, 545 A.2d at 1219, and thus the case should be remanded to the trial court to vacate the predicate felony underlying the murder charge, in this instance, attempted armed robbery of Mihailov.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused two copies of the foregoing Brief for Appellee to be served by first-class mail, postage prepaid, to counsel for appellant: Bruce Johnson, Esquire, 4301 Northview Drive, Bowie, Maryland 20716, on this 29th day of October, 2003.

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